IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO. 957 OF 2003

Paradyne Infotech Pvt.Ltd. .. Petitioners
versus
India Online Network Limited. .. Respondents.

Shri R.M. Kadam with Ms. Heena Chheda i/b. Nariani and co. for the petitioner.

Shri F.E. Dvitre with Akshay Wani i/b. Singhania and Co. for the respondent company.

CORAM: S.U. KAMDAR, J.

DATE : 13TH JANUARY, 2005.

P.C. :

1. The present petition is filed under section 434 of the Companies Act-I of 1956 for winding up of the respondent company on the ground that the company is unable to pay its debt. The claim in the present petition is for a sum of Rs.3,44,47,584/- comprising of a principal amount of Rs.2,51,90,190/- and interest thereon of a sum of Rs.92,57,394/-. The brief facts of

the present case are set out as under :

2. The respondent company is a public limited company incorporated sometime in or about 25.3.1985 and was originally known as Natwar Synthetics Ltd. On 9.6.2000 the name of the respondent company was changed to India Online Network Limited. Between March and April, 2000 the respondent company desired to start a business of providing internet services and thus approached the petitioner for supply of required information technology products. Under the said understanding arrived at between the petitioner and the respondent company, the petitioner was required to supply hardware and software for starting the said technology businesses by providing internet services. Pursuant thereto various purchase orders were placed both in writing and oral by the petitioner company and the goods were sold, supplied and delivered by the respondent and various invoices were raised in respect thereof. It is the case of the petitioner that in respect of the said goods sold the respondent is liable to make payment of principal amount of Rs.2,45,71,065/- It is further the case of the petitioner that since the

respondent company failed and neglected to make payment of the outstanding amount under the terms and conditions of the invoice the respondent is also liable to pay interest at the rate of 21% per annum to the petitioner. According to the petitioner time and again assurances were given by the respondent company of clearing the outstanding amount. However no payment was effected. The petitioner has also relied upon an acknowledgment of liability by the respondent company contained in a letter dated 14.7.2001. The said letter dated 14.7.2001 has been issued by the respondent company and signed by Manager Accounts who has confirmed that there is an outstanding amount due and payable by the respondent company to the petitioner for a sum of Rs.2,45,71,065.05/- as on 31.3.2001.

2. A statutory notice was given on 8.11.2002 by the petitioner to the respondent company demanding the aforesaid amount as due and payable by the respondent to the petitioner herein. To that statutory notice i.e. 8.11.2002 there was no reply by the respondent company. In the aforesaid circumstances the petitioner has filed the present Company petition on 18.8.2003

inter-alia claiming that the respondent company is unable to pay its debt by virtue of it becoming defunct under section 434 of the Companies Act and therefore the respondent company should be wound up.

3. There has been an affidavit in reply filed by the respondent company and affidavit of rejoinder by the petitioner. The respondent company has also filed an affidavit of sur-rejoinder in the present proceedings. For the first time the respondent company has disputed the liabilities of the petitioner by filing reply to the present company petition. The learned counsel appearing for the respondent company has placed before me three defences and has contended that by virtue of the said three defences there are bonafide disputes in respect of the claim raised by the petitioner and therefore the present company petition should not be entertained and the same should be dismissed. The defences raised by the learned counsel are briefly summarized as under:

4. The respondent company had a vice-president known as Mr. Abhishek Gautam and the petitioner has

committed a fraud on the respondent company in collusion with the said Abhishek Gautam and thus the claim of the petitioner is fradulent and therefore should not be entertained. In respect of the aforesaid contention it has also been urged by the learned counsel for the respondent company that a criminal complaint has already been filed against Abhishek Gautam and a F.I.R. is registered. The said Abhishek Gautam was arrested and therefore there are serious disputes as to the claim of the petitioner herein and thus the present petition should be dismissed as in his submissions the aforesaid defence is a substantial defence raising bonafide dispute in respect of the claim of the petitioner.

5. The next contention urged by the learned counsel for the respondent company is that there are serious discrepancies between the amount mentioned in the purchase order and invoices by virtues of the said discrepancy there is a dispute raised by the respondent company for a sum of Rs.59.82 lakhs and therefore the claim of the petitioner is not maintainable. It has been contended by the learned counsel for the

respondent company that the said discrepancies have been admitted by the petitioner and therefore there is a serious bonafide defence to the claim of the petitioner and the petition should be dismissed.

6. The third contention raised by the learned counsel for the respondent company is that the whole claim which is outstanding is bogus. It has been urged by the learned counsel for the respondent company that infact the petitioners have raised bogus Invoice no. 779 dated 7.12.2000 and Invoice No.751 becuase both are of the same date and for supply of same goods. It is contended that the invoice amount is a sum of Rs.2,40,01,391/- and if the credit is given for the said amount then nothing is due and payable. The learned counsel for the respondent company has contended that infact two invoices are raised in respect of the delivery of the same goods and when the same fact was pointed out the petitioner has withdrawn one of the said invoices. According to the learned counsel for the respondent even in respect of the second invoice the respondent company is not bound to pay because the respondent company has not received the

said goods covered under the said invoice. In view thereof there is no claim payable by the respondent company to the petitioner herein. On the basis of the aforesaid three contentions which were raised before me the learned counsel for the respondent company has contended that the present petition should be dismissed with costs.

7. I have considered the rival submissions of the parties. Insofar as , the first contention is concerned that there has been a fraud committed by Abhishek Gautam who was the Vice-President of the company, the whole case is based of the respondent company on an amount sought and advanced by the petitioner to the mother of Abhishek Gautam of sum of Rs.15,00,000/-. It is the case of the respondent company that the amount has been advanced by the petitioner of Rs.15,00,000/- to the mother of the said Abhishek Gautam of the respondent company. However, initially the respondent pretended that they are not aware that the amount advanced is to the mother of the said Abhishek Gautam but ultimately admitted and contended that the same is by way of a loan. It is

therefore contended by the learned counsel for the respondent company that the fact that the said amount is advanced by the petitioner to the mother of the said Abhishek Gautam itself indicates that both the petitioner as well as Abhishek Gautam were hand in glove and therefore the claim of the petitioner ought to be rejected. It is further urged by the learned counsel for the respondent company that infact the said amount is not a loan advanced to the mother of Abhishek Gautam but it is in the nature of kickback or a bribe with a view to defraud the respondent company. It is the contention of the respondent company that in collusion with the said Abhishek Gautam the petitioner has purpotedly raised invoices of the said amount which is much more than market value of the goods or raised invoices for which no goods are delivered. It is even contended by the learned counsel for the respondent company that the claim of the petitioner is fraudulent and therefore the same should be rejected.

8. On the other hand the learned counsel for the petitioner has pointed out that insofar as the so

called criminal case filed by the respondent against Abhishek Gautam is concerned, the petitioner have nothing to do whatsoever with the same. It has been further pointed out that the F.I.R. is lodged in June 2001 and till today there is no whisper made in the said criminal complaint that the petitioner is in any manner involved in the so called fraudulent action of Abhishek Gautam to defraud the respondent company. The learned cousnel for the petitioner has also pointed out that the contention that the goods are supplied at a much higher rate cannot be accepted for the simple reason that infact the necessary amount in various invoices have already been paid save and except the balance amount of Rs.2,51,00,000/- and therefore the so called bogie raised is baseless and an after thought.

9. On the aforesaid rival submissions I am of the opinion that the present contention of the respondent company has no merits. Firstly even if there is any fraud committed by Abhishek Gautam who was the employee of the respondent company then it is between the said employee and the respondent company itself and it can in no manner whatsoever be attributed to the petitioner

herein. It is undoubtedly true that an amount of Rs.15,00,000/- is advanced to the mother of Abhishek Gautam by the petitioner herein though the respondent company is disputing the same. loan However, I take the case of the respondent company at the highest for the time being the said payment may be considered as a Kickbribe or bribery, but then that by itself is no ground to defend the claim of the petitioner company. Petitioner has admittedly sold and delivered the goods to the respondent company and in respect of substantial supplies the respondent company has also effected payments. Thus in my opinion it is not possible to accept the contention of the learned counsel for the respondent company that merely because of the aforesaid transaction of Rs.15,00,000/- the claim of the petitioner should be defeated. This coupled with the fact that though the complaint is lodged admittedly in June 2001 against Abhishek Gautam still the respondent company continued to receive supplies of the goods upto March, 2002 from the petitioner without raising any dispute of any nature whatsoever. The respondent company has infact admitted the claim by the acknowledgement of liability and even to the statutory

notice there is no reply raising any such dispute. It is also however an admitted position before me that insofar as criminal complaint is concerned it is openly filed against the said Abhishek Gautam and none of the officers of the petitioner are included therein. There is not even are allegations against any of the officers of the petitioners. Thus if any fraud is committed by Abhishek Gautam then it is between the respondent company and him and the same is an internal management of the respondent company for which in my opinion the claim of the petitioner cannot be defeated.

10. This takes me to the next contention of the learned counsel for the respondent company that there are discrepancies in respect of various amounts mentioned on the purchase orders and invoices. It is the case of the petitioner that in respect of the said discrepancies the petitioner has given due credit in their affidavit in rejoinder. In paragraph no.35 the necessary credit is given and in respect of the twenty instalments necessary explanation has been furnished. In any event if the amount of Rs.59,82,00,000/- is taken as a credit amount in respect of the

discrepancies in the purchaser orders and invoice still a huge amount of more than of Rs.2.00 crores would be outstanding against the respondent company. In respect of the said balance amount in my opinion there is no defence save and except the defence which has been raised of the criminal complaint and the defence of non-supply of goods which is dealt with hereafter. It is a settled law that even if the claim is admitted of more than Rs.500/- then also the company petition is maintainable and if the company fails to make an admitted claim of more than Rs.500/- then petition for winding up would lie.

11. This takes me to the third contention of non delivery of goods under the two invoices of Rs.2,40,00,000/-. The defence in this respect has been set out by the respondent company in paragraph-8 and 9 of the petition. It seems there were two duplicate invoices and amounts were claimed in respect of both Invoices bearing Invoice No. 751 and another bearing Invoice No. 779 both dated 7.12.2000. Since the respondent company has pointed out the aforesaid fact that in respect of the delivery of the same goods there

are two invoices the petitioners have withdrawn their claim under one of the said two invoices. However the respondent company has contended that even in respect of the second invoice they are not liable to make payments because they have not received the delivery of the said goods at all. It is has been contended by the respondent company that the acknowledgement of the receipt of goods is by Abhishek Gautam and in the light of the fraud committed by Abhishek Gautam the acknowledgement of the delivery of the goods by him cannot be accepted.

12. I am not impressed with the aforesaid arguments of the respondent company for more than one reason. Firstly it is pointed out that the respondent company never disputed the delivery of the goods till filing of the affidavit in reply. Infact it is an admitted position before me that the claim amount in the said one of two invoices forms part of the books of accounts of the respondent company. It is also an admitted position before me that the said invoice which is of 7.12.2000 and thereafter payments are effected by the Company without raising any question or dispute

pertaining to the delivery of the said goods. It is not explained by the respondent company which is a public limited company that if the goods are not received under a particular invoice then how and on what basis the said invoice is accepted and entered into the books of account and infact subsequent payments are made to the petitioner in respect thereof. A public limited company is bound to maintain entries of the goods received and atleast at the end of the year it should have noticed that there is a shortage of stock and the respondent company should have raised the dispute at least at that stage. However even after the expiry of three years no such dispute is raised till for the first time it has been raised in the affidavit in reply preferred by the respondent company. As against this the petitioner has accounted for the said invoice and has withdrawn one of the duplicate invoice when it was pointed out that there were two duplicate invoices in respect of the same goods. Further more the petitioner has also pointed out that infact inrespect of the said invoice the payments are received and the claim is made by the petitioner which is at the foot of the account as on March, 2000. The learned

counsel for the respondent company has however contended that the said payment was not against each invoice but on a lumpsum basis. In my opinion it would not make difference whether the said payment is a lumpsum payment or against each invoice. I am of the opinion that alteast at the end of the year the respondent company would have noticed that there is shortage on receipt of goods and would have raised an objection at that stage. It is still inexplicable that how payments would be continued to be made even of the goods which are not received. In view thereof I do not find any substance in the contention that the goods under the said invoice are not received except the contention on affidavit, there is no material to show that infact the said goods were not received. As against the same the petitioner has proved the goods as duly delivered and the receipt of the goods are duly acknowledged by Abhishek Gautam. The invoice is duly accounted for by the respondent company in their books of accounts and thus I am inclined to take a view that the contention of the respondent company of non-receipt of the goods under the said invoice is not bonafide defence but raised as an afterthought to defeat the

claim of the petitioner herein.

13. Apart from the aforesaid facts I called upon the respondent company to produce their books of account for the year ending 31.3.2001 and 31.3.2002 which the respondent company has produced. The balance shown in respect of the said amounts indicate clear acknowledgement of liabilities of the petitioner as on 31.3.2002.

14. Further more the learned counsel for the respondent company has been candid enough to admit that the said liability is included even in the latest balance sheet of the said company. However the learned counsel for the respondent company contends that mere acknowledgment of liability in the balance sheet should not be taken into account for the purpose of rejecting the contentions raised by the respondent company in the present case. I am of the opinion that the contentions of the respondent company are liable to be rejected firstly because all the contentions raised are at a much latter stage that is after the filing of the company petition. Secondly because there is an

acknowledgement of liabilities in the letter dated 14..7.2001 Thirdly because there is an acknowledgment of liability even under the latest balance sheet of the company. Fourthly, because the contentions raised by the respondent company are not supported by cogent material and evidence in respect thereof. Fifthly, the contention of criminal case being filed is concerned the same is not against the petitioner or any of its officers nor any allegations are made against them insofar as the fraud committed by Abhishek Gautam is concerned. Sixthly, the contention of discrepancies in purchase orders and invoices does not survive in view of the fact that substantial credit is already given by the petitioner. Seventhly, in respect of the contention that there are no goods received in respect of the invoices which are issued by the petitioner is concerned, the same cannot be accepted because the said invoice is infact accepted and included in the books of the account of the company. also does not have material evidence in respect of the said contention.

15. In the aforesaid light of the matter in the interest of justice, I pass the following order :

i) I direct the respondent company to deposit in this court a sum of Rs.1.00 crore/- (Rs. One Crore only) within a period of twelve weeks from today.

ii) If the said amount is deposited, then the present petition to stand dismissed and the petitioner will be at liberty to file appropriate suit within a period of four weeks from the date of intimation of such deposit.

iii) In the event of deposit being made, the said amount to be invested in fixed deposit initially for a period of three years and renewed thereafter till further orders of this court. The said amount if deposited the same to be transferred to the credit of the suit which shall be filed by the petitioner. If no such suit is filed than the respondent company would be at liberty to the withdraw

the said amount on the expiry of four weeks from the date of intimation of the petitioner herein.

iv) In the event if the respondent company fails to pay the amount then the petition to stand admitted and the same to be advertised in Free Press Journal, Nav Shakti and Government Gazette. The petitioner to deposit a sum of Rs.2,000/- to the office of the Prothonotary and Senior master.

v) Petition disposed of accordingly.

SD/-

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